Presented:

Mortgage Lending Institute

September 18-19, 2014

Austin, Texas

October 2-3, 2014

Dallas, Texas

Legal Editing Style Guide –

a New Approach to Editing

Kevin M. Kerr

Author contact information:

Kevin M. Kerr

16600 Dallas Parkway, Suite 310

Dallas, Texas 75248

kevin@kkerrlaw.com

KEVIN M. KERR, P.C.

ATTORNEY AT LAW
16600 DALLAS PARKWAY, SUITE 310
DALLAS, TEXAS 75248
972/ 644-3335 EMAIL: KEVIN@KKERRLAW.COM FACSIMILE: 972/ 692-8020

Kevin graduated from the University of Houston, Bates College of Law, in May, 1981, where he served as the Executive Editor of the *Houston Law Review*. Before law school, he graduated from University of Texas at Austin in December, 1977, graduating with honors and majoring in Finance.

ACTIVITIES

Past Chair, Real Estate Forms Committee, State Bar of Texas.

Past Chair (1993-1996), Dallas Bar Association, Real Property Section.

Member, Various Planning Committees for the State Bar of Texas and University of Houston.

Director, Advanced Real Estate Law Course (1994) (State Bar of Texas).

Moderator, Advanced Real Estate Law Course (1995) (State Bar of Texas).

Speaker/Author: Numerous articles written for real estate related legal topics, including the Dallas Bar Association Real Property Section, State Bar of Texas, South Texas College of Law, University of Texas Law School, University of Houston Law Center, and Southern Methodist University School of Law.

Former Member: City of Allen, Texas Planning and Zoning Commission
Former Member: Allen Independent School District Board of Trustees

Additional information, including copies of CLE presentations, is posted on my website: www.kkerrlaw.com.

TABLE OF CONTENTS

LEGAL EDITING STYLE GUIDE – A NEW APPROACH TO EDITING

1. Introduction. There are thousands of books, articles, blogs, seminars, and speeches on legal writing. They all say the same thing. They have been around for a long time. The problem is lawyers don't change. We learn our drafting skills from older lawyers and forms. Once learned we cannot let them go.

Some articles focus on Legal ***Writing***. Writing articles are focused more on persuasive writing, for example, pleadings, motions, and legal briefs.

Others deal with Legal ***Drafting***. Drafting articles cover a broader subject. In order to properly draft a contract, an attorney has to: (1) know the law, (2) know the client's business, (3) know the client's needs, (4) participate in the give and take of negotiations, and (5) advise the client of the final terms.

A few articles cover Legal ***Editing***. We all agree on the basic rules of editing. All sentences start with a capital letter and end with some type of punctuation. Why? Because if we simply wrote words without capitals and periods people had trouble understanding what we mean. Noun/ verbs have to agree. We don't say "Bob and Jane *is* going to the store." But from that point on, lawyers don't really agree on any editing rules. English teachers abhor sentences in the passive voice. It is traditional to say "the earnest money will be released by the title company." Bryan Garner [and every other expert] discourages the use of "shall." But lawyers use it everywhere. "The purchase price shall be $10,000,000."

Based on very limited surveys of Texas attorneys, lawyers do not have many real editing rules. We believe in the prior forms as handed down from long ago on stone tablets. After all, in practicing law, we allocate the necessary billable time to the drafting phase. But when it comes to the editing phase, deadlines, commitments, and the urge to use the same tried and true form prevails and contracts go out without any real consideration of "editing."

There really isn't anything in this article that hasn't been said before and by more qualified authors. Blaise Pascal, a French mathematician, wrote this comment in his collection of letters called "*Lettres Provinciales* in 1657, "*[i]f I had more time, I would have written a shorter letter*[1]." It seems contradictory that using fewer words takes more time. But this isn't a new phenomenon created by a digital world of smart phones, word processors, and emails.

Despite hundreds of years of improving our language and intellect, our biggest problem is still a failure to edit.

2. Acknowledgement. This article is a reprisal of "Legal Editing – a New Look at an Old Topic," Advanced Real Estate Drafting Course 2014, presented by Kevin M. Kerr and Sherry Priest.

3. A tale of two editors. My years on the Real Estate Forms Committee taught me there are two types of lawyers when it comes to editing.

The first is the "Clenched Fist Editor." In negotiating language, the Clenched Fist Editor has a stern demeanor, a furrowed brow, and bulging neck veins. When asked to remove words from the document, the

[1] See http://quoteinvestigator.com/2012/04/28/shorter-letter.

Clenched Fist Editor shouts, "those words will stay in my tried and tested form unless you can convince me that they are wrong!"

The other is the "Open Palm Editor." This editor is characterized with a calm, peaceful, maybe even angelic countenance. Serenity pours from the Open Palm Editor's voice. When asked about a word in the form, the Open Palm Editor quietly replies, "we shouldn't leave that language in unless it is necessary."

You have to decide who you are - or, who you want to be. If you are content being a Clenched Fist Editor, then enjoy the talk and get your CLE credit. But if you are a Clenched Fist Editor and you would like to explore the world of the Open Palm Editor, then I invite you on the journey. It is a journey because there isn't an easy solution. We all have very bad editing habits, as attested to in the hundreds of critical articles on the internet about legal writing. You will also have to fight partners in your firm and the attorneys you negotiate with in this new endeavor.

4. A familiar story. Bryan Garner wrote a preface for Matthew Butterick's book, *Typography for Lawyers*. It is a prose narrative of a supervising lawyer critiquing an associate's memorandum. She complained that the associate: (1) underlined case names instead of using italics; (2) used two spaces instead of one after a period; and (3) the font was ghastly [Byran's word]. She said the associate should have used Butterick. Of course, the memo had to be re-written in order to be presentable [by the supervising lawyer's standards].

This same scene played out at a law firm in my past. The associates knew the "style" of different partners. One liked underlined definitions [(the "Contract") the other didn't. Even though we had IBM mag-card type writers and such editing changes were tedious, that was the rule.

How much time is wasted with silly in-house changes just to suit the whim of each supervising attorney? Why wasn't the associate trained on the required style upfront, rather than being presented with Butterick after the fact?

5. The Problem. High school and college curriculums have eliminated writing requirements. Law schools have never really offered courses on contract drafting. At best, the writing component consists of oral advocacy/ legal brief writing.

Law firms rely on forms handed down from the ages. Then each attorney develops a style and instructs each associate accordingly. This leads to random rules on construction.

Great care is given to the legal issues of the document, but not the overall style.

Lawyers think their writing is great, it's the other lawyers that are terrible.

6. The Solution. Every law firm should develop a Legal Editing Style Guide.

Newspapers have style guides. The most popular is the *Chicago Manual of Style*. According to Wikipedia:

> What is now known as *The Chicago Manual of Style* was first published in 1906 under the title *Manual of Style: Being a compilation of the typographical rules in force at the*

> *University of Chicago Press, to which are appended specimens of type in use*. From its first 203-page edition, the *CMOS* evolved into a comprehensive reference style guide of 1,026 pages in its 16th edition. It was one of the first editorial style guides published in the United States, and it is largely responsible for research methodology standardization, notably citation style.

From a simple beginning of typographical rules, it has grown to be the driving force in publishing standards.

Courts have style guides. The blue book and green book. Judges expect a uniform system of case citation in pleadings. Most courts also have page, margin, font size, and line spacing rules.

Dictionaries are style guides. No supervising lawyer would say on a whim, "I've never cared for the spelling of "office" I think one "f" is sufficient!"

7. Why not just buy one? There are many books and articles about the rules of editing. There are software programs that claim to re-write your documents for you. But if you don't develop it as a firm, then you'll never own it and use it. Most commercial products are too complicated. If the Style Guide is over whelming, you'll let it sit on the shelf and gather dust.

8. Top-Down. Developing a Style Guide has to be a top-down model. If the senior team isn't behind it 100% with consequences, then it will never work. An associate can't tell the partner remove passive voice sentences.

9. What would a Style Guide look like?

A. It should have an aspirational statement of its purpose. Maybe, to communicate with clients? Or, eliminate archaic legal phrases? Or, distinguish the firm's work product with a consistent plain English style?

B. Start by agreeing on the basics. Margins, font, font size, title, footer. There shouldn't be a reason to have these things being set and reset depending on the author's preferences. Here's an example of my selections:

Margins: 1" top and sides, ½ on the bottom

Font: Times New Roman, 12-point

Title: Centered, small caps, bold, 14-point

Footer: Use title, 11-point with a right justified Page *

Granted these are arbitrary, but Brenda and I work together, not opposite. Your team can kick around/ argue/ debate the pros and cons of each part, but you have to have an agreement.

C. Adopt uniform conventions.

Words: Seller; Buyer [not Purchaser]; Landlord [not Lessor]; Tenant [not Lessee]

Underline defined terms ("Seller")

Underline exhibit references (see Exhibit A)

Have a clause incorporating exhibits and never add incorporating language in the document ["attached hereto and made a part hereof for all purposes as though set forth in full"]

Never use "the" in front of a defined term for a proper name.

Numbers: use numeral only. Example "a $10,000 Note". Demand is made to cure the default in 30 days.

Spacing after punctuation.

D. Adopt Rules.

Shall

Passive voice

Present tense

Avoid doublets/ triplets

E. Track a Contract form with edit notes.

Opening paragraph:

This [Title, Contract of Sale] (the "Contract") is entered into by [Seller Name], a [state/company], and [Buyer Name], a [state/ company] as of [month ___, year].

Instructive notes:

A. Title: use the exact Title, with initial caps only, not bold.

B. Always underline defined terms.

C. Use Seller, Buyer, Landlord, Tenant, Lender, Borrower. Not Purchaser, _____ [other examples].

D. Not "by and between", "made and entered into", _____ [other examples].

E. Dates are always Month ___, Year. Never "the ___ day of Month, Year".

F. Never include the address in the opening.

G. Never include (*hereinafter referred to as* Seller *for all purposes*)

3. Background section.

Instructive notes:

A. Use Background, not Witnesseth or Recitals.

B. Centered, bold.

C. Use capital letters for each section.

D. Use sparingly, to tie this document to another or provide necessary information.

E. Avoid meaningless information: "Seller has agreed to sell and Buyer has agreed to buy".

4. Consideration:

For valuable consideration, the parties agree as follows:

Instructive notes:

A. Never: **NOW, THEREFORE**, ...

B. Never: Ten Dollars ($10.00) and other good and valuable....

C. Just the parties. No need to define the parties as the "Parties". Never: "the parties hereto". Never: "parties hereby expressly agree".

10. Summary of prior Articles. Exhibit A contains a summary of legal writing articles. The articles were selected as a diverse source of authors: academia and practicing lawyers.

11. Survey Results and Comments. Exhibit B is a summary of a survey of attorneys.

12. Sherry's Grammatical and Editing Tips.

A. Why plain English? The most important point I would make about any writing has been made many times. Know why you are writing, what you are writing, and write accordingly. A love letter and a pre-nup are both about one's vision of a romantic future but even the best pre-nup makes a lousy love letter. And vice versa.

Here are some examples.

- I am not the grammar police. I won't say, "never use the passive voice." I have used it in memos and letters to obscure responsibility or avoid confrontation. Use it if it serves the purpose of your writing, but not if it doesn't.

- I have an opinion, I am pro-serial comma. However when I'm editing something, if the author doesn't use a comma before the final "and" but the writing is clear without it, I won't add one unless called for by an applicable style guide.

- I use "he" as the generic pronoun but I write around it when I can do so gracefully, as I did in the last sentence. The primary purpose of most writing is not to advance social change around gender and random pronouns are a distraction.

- Most of us were educated to produce writing that demonstrated how much we knew and how smart we were. For many, this is a deeply ingrained way of thinking about writing we are barely aware of. (My first draft of this paragraph included the word "erudition.") But the purpose of drafting a sales contract or a lease is very seldom to prove how smart you are. That's really the message of plain English in legal writing. Unless the purpose of your writing is to get an A on your paper, you don't have much reason to use overly complex sentences or uncommon words.

B. Editing is really three things. What is called editing usually includes fact checking, proofreading, and editing. All three are important and are best done in three steps.

- Fact checking in transactional documents is mostly about making sure volume and page numbers, property descriptions, dates, names, and such are right. I prefer to do this in a single review focusing just on this.

- Checking headings has more in common with fact checking than the other editorial steps in that it benefits from a single, focused review. Headings are a common place for typos because they tend to get skimmed over. (By the way, ending a sentence with a preposition is OK most of the time.)

- A first run at basic proofreading can be done using spellcheck and the like. (Kevin discusses some of these tools elsewhere in the article.) I can't type or spell worth a darn so I spellcheck everything. But please do not skip having a human proofread your draft. I recently saw a webpage for a school board candidate that used the word "Untied" in the place of "United" in multiple places. Other things to check at this stage include punctuation, noun-verb agreement, and use of the proper verb tense.

- Finally, editing encompasses reviewing for clarity, precision, and conciseness. This is the focus of most of our article.

C. Editing is worth the time. Clear communication is worth the time. Sloppy writing will cost you sooner or later. Editing is like cleaning house. If you don't do it, eventually things will get sticky.

D. Use style guides. My department uses the *Chicago Manual of Style*, The Blue Book and Green Book, *Black's Law Dictionary*, a department style sheet, and an individualized style sheet for each project. You probably don't need all of that. However, you will save time if you make the decision once that the default answer to grammar and usage questions will come from the Chicago Manual; or Bryan Garner's *The Redbook; A Manual on Legal Style*; or the US Government Printing Office *Style Manual*; or any of the many other possibilities. These are working documents, not treatises on usage.

E. In English, common nouns take the lower case. To quote Wikipedia, "questionable capitalization of words is not uncommon . . . ." If you start a word with an upper-case letter, you should be able to articulate a good reason. "It's important" is not a good reason. Randomly capitalizing common

nouns is raw legalese. If you clearly define a word, like "seller" in a legal document, that word becomes the equivalent of a proper noun, like a name, and can be capitalized. If a word starts a sentence, it should be capitalized. There are a few specific words that get capitalized that are not names or titles but not many. At the barest minimum, be consistent what you capitalize within documents.

F. Apostrophes, like uppercase letters, are overused; or mind your p's and q's. I was asked to do a quick review of one of the most abused of all punctuation marks, the apostrophe. The Urban Dictionary defines the apostrophe as a "particularly useful piece of English punctuations for making yourself look stupid." http://www.urbandictionary.com/define.php?term=apostrophe

There are two main functions of the apostrophe. One is to stand in for missing letters, for example in the word "isn't." The other is to indicate the possessive case, as in the phrase "the puppy's water bowl." Contractions (isn't, he'll, I'm) are discouraged in legal writing so the focus in this section is on possessives.

Possessives are easy as long as the noun involved doesn't end in the letter S. Just stick the apostrophe at the end of the word and add the S. Luckily this covers the majority of words. If you have a singular word that ends in S, (goddess, class) you still usually add an apostrophe and an S (goddess's chariot, class's behavior). This rule is also applied to proper nouns (Camus's novels).

If you have a noun that has been made plural, and so ends in S (kittens, puppies) it usually is made possessive by adding just an apostrophe (the puppies' water bowl). This includes most proper nouns (the Kennedys' marriage).

These two rules cover almost everything. If you follow these rules and the word looks wrong to you, write around it (the behavior of the class, the bowl for the puppies). Or look it up. The easiest way is to put it in your favorite Internet search engine. In other words - *Google* it. I promise professional editors do this all the time.

Apostrophes are occasionally used to form plurals but the style guides vary widely on this point. For example some guides use "PhD's" and some use "PhDs" for the plural of PhD. "Mind your P's and Q's" usually appears with apostrophes but sometimes does not. I could not find an example of "X's and O's" without an apostrophe. Luckily, these phrases are not used often in legal writing so you can just put this out of your head for now.

On the other hand, there is one tricky thing about the apostrophe you shouldn't put out of your head. Two words that trip everyone up on occasion are "its" and "it's." The word "it's" looks like it could be the possessive of "it." But it is not. It is the contraction of "it is." The word "its" is a possessive pronoun, like his or her (his age, her age, its age). Make one quick pass through a document using the find feature looking for "it's" because it is probably wrong.

13. Kevin's suggestions for editing. There are two general approaches to legal editing articles: the academic and the hands-on. During the course of my service on the Real Estate Forms Committee, I went from being a "tall building lawyer" to a "one riot, one Ranger" lawyer. This caused me to ask, "what will I do for forms?" In building my forms library, I knew I would be representing smaller clients, usually just one owner. I decided to set up my library in the style of the Forms Manual, plain English and readable.

I readily admit these rules are plagiarized from various sources over the years and hope that somehow the concepts are now part of the unprotected public domain.

How do you use these rules? Simple – start with a form you want to clean up. Then use the "find feature" in Word. This helps you stay in editing mode, i.e. looking for problems and not getting sucked into the vortex of the document.

A. Don't use shall. How simple is this one? Bryan Garner has written extensively on the evils of shall[2]. Practically everyone who's anyone in the field of legal writing condemns the word "shall." Shall has two meanings that can be difficult to distinguish by context. Shall can express future tense and it can express a directive. Lots of words have more than one meaning but the meaning is usually clear from the context. This is not the case with the word "shall." If your goal is precision, then don't use this imprecise word. If your goal is plain English, then don't use this word. If you are trying to emulate Garner, then don't use it.

As the cursor stops (and stops, and stops, and stops) on "shall" consider alternate words for precision: may, will, and must. If the concept requires a duty on the part of the actor, then say that. Here is an example from a contract followed by a revision:

> Original: Closing shall occur on the Date of Closing by mail (as set forth in Section 8.4) at the offices of the Title Company, or at such other time and place as may be agreed to in writing by Seller and Purchaser.
>
> Revision: Closing will occur on the Date of Closing.[3]

If you still need a reason to eliminate shall from your written vocabulary, the Nutshell Legal Drafting book (cited earlier in this article) cites a study that found over 1,100 cases interpreting the word.

B. No passive voice (or, passive voice shall never be used by me). Okay, there are some grammatical exceptions for passive voice, and it won't kill a document to have a couple, but start with the rule that you will not use passive voice. The real problem with passive voice is we never speak it, but for all of our bad training (or lack of training) it is the natural way lawyers write.

To eliminate it, use the search feature for "by." Now turn the sentence around and use an active verb. For example, here is a sentence from a contract followed by a revision:

> Original: The Deposit shall be paid by the Title Company to Seller at Closing and credited against the Purchase Price.
>
> Revised: The Title Company will apply the Deposit to the Purchase Price at Closing.

[2] Google the phrase "Bryan Garner use of shall" and the first entry is an ABA Journal article entitled "Shall we Abandon Shall?"

[3] Several changes are going on here. "Shall" is replaced with "will." The phrase "by mail (as set forth in Section 8.4) at the offices of the Title Company was dropped. As Section 8.4 says that (trust me, it does) why repeat it here? The final phrase "or at such other time and place as may be agreed to in writing by Seller and Purchaser" was dropped. I believe the parties have a God-given right to change any term whenever and however they choose. You don't need contractual permission to change a contract by the agreement of the parties. Or, if you need it here, then do you need it everywhere?

C. Write in the present tense. I think I picked this up from Garner along my journey. Instead of phrasing a default clause, "Tenant shall be in default if …" say "Tenant is in default when…." When you are writing it the event may or may not happen in the future. But when a client calls and needs to enforce the clause, you are in the present tense.

D. No doublets (or triplets, quadruplets, etc.). Legal writing scholars trace our use of these word strings to medieval Europe. Scribes dealt with a community of Anglo-Saxon, French, and Germanic influences. So they would use an accepted legal term from each culture to express the idea. Another explanation is the fear that something might fall between the cracks if you don't keep adding words. My explanation is the Clenched Fist Editor rule. Here's an example with the questionable phrases highlighted:

> Purchaser *acknowledges, understands and agrees* that the Property Documents may have been prepared by parties other than Seller and that Seller makes no *representation or warranty whatsoever*, express or implied, as to the *completeness, content or accuracy* of the Property Documents.

E. No legalisms. Be on the lookout for phrases that scream ***LAWYER***!

1. A Promissory Note in the original principal sum of One Million and No/100 Dollars USD ($1,000,000.00) . . . . Isn't it just a $1,000,000 Promissory Note? I am a firm believer that when referring to an amount, just use numerals. In the case of the promissory note, I now use numerals only. Some legal scholars attribute the word/numeral couplet to the fraud potential in hand-written documents.

2. **NOW, THEREFORE,** in consideration TEN and NO/100 Dollars, in hand paid, together with the mutual agreements and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller and Purchaser agree as follows…. Do we need any consideration recital at all? Either a contract has it or it doesn't. The mere recital will not win the day. A written contract is presumed to have consideration. *Nolana Development Association v. Corsi*, 682 S.W.2d 246, 250 (Tex. 1984). But consideration can be challenged. *Fourticq v. Fireman's Fund Ins. Co.*, 679 S.W.2d 562, 566 (Tex. App.- Dallas 1984, no writ).

Is it time to just identify the parties and start into the agreement?

3. Know All Men (or Persons) By These Presents…. This one is a favorite. Years ago while visiting Oxford, I went to a small museum with dinosaur bones, original settlors in diorama settings, and a charter document on sheepskin, written in Latin. There was a translation on the wall that went something like this[4]:

> "Be it known to all those present and future that…"

How is it that we have taken a beautiful phrase (probably in the plain English terminology of the day) that proclaims "now and forever more" and bastardized it to the meaningless heading we carry over in this enlightened age?

F. Use fewer words. Enough said.

[4] I searched the internet for the actual King's charter of Oxford, but could not find it. But this phrase comes from a document confirming a land gift to the church in Oxford.

G. Put a period in the middle. Or as Sherry likes to say, "punctuation is free, use it." I confess that rules F and G come from a writing book I purchased years ago when I was on the Forms Committee. It started with a preface saying there are only two rules for lawyers. Use fewer words. Put a period in the middle. I have lost the book and cannot cite the source for proper credit. Googling didn't help.

Why do we feel compelled to keep a sentence going on and on? Has Mr. Weatherbie reported a case where a judge said, "gosh I have to stop interpreting the meaning at the period, I can't consider the words in the next sentence?"

Microsoft Word will let you check the readability of your document. In my version, I click "review", then "spelling and grammar". At the end of the process it shows (1) average sentences per paragraph, (2) average words per sentence, and (3) average characters per word. If (1) is too high, try to find separate thoughts in a paragraph and split up. If (2) is too high, try to find the surplus words and cut. If (3) is too high, try to use smaller words (car instead of automobile or motor vehicle, unless you mean "motor vehicle as defined in the Texas Transportation Code" or such because that is relevant to your particular contract). The Word chart also shows the percentage of passive- voice sentences and a Flesch-Kincaid Grade Level score for readability[5].

H. Limit use of a semicolon. While they have a valid place and are necessary from time to time; lawyers seem to use them as an excuse to keep a sentence going; the better style would be to use periods; and get over your fear that stopping a sentence will somehow cause the entire document; to fail.

I. Eliminate the words like "hereby" and "herein." There are many word lists that tell us to eliminate long phrase in Column A phrases and use Column B words instead. These words are just old habits that keep turning up. By the way, if you feel the need to say "the Parties hereby agree…" Do you also feel compelled to add "expressly"?

J. Don't use "except as otherwise expressly set forth herein." If there is a conflict, fix it.

K. Don't restate the law. This rule comes from the Forms Committee. There isn't a good reason (other than adding length to a deed of trust) to recite the foreclosure steps from the Texas Property Code. Besides, laws do change sometimes.

L. Check defined terms and use them correctly. This is also a word search feature exercise. With all of the editors and cutting and pasting, it is very easy to get inconsistent definitions. Or worse, the defined term that is used only once. I object to the style that creates a defined term, then cross-references back to the definition section every time it is used.

M. Severely restrict recitals. If they are really, truly helpful to orient the reader to relevant history, then use them. I recently had a contract go on for many extensions and the seller's lawyers kept adding a new recital for each extension. By the time we got to the 18th extension, the agreement had two pages of recitals for a one paragraph agreement.

N. Be careful about a section you don't understand. Chances are it is just in the form and nobody else knows why.

[5] The Flesch-Kincaid score for this article, including the forms is 60.6. That puts us in a readability range of a 15 to 16 year old. I tested some random documents and found scores in the 30's. Unlike golf, lower is not better. The major factors in the score are number of syllables and words per sentence. Mr. Flesch was a lawyer and a pioneer in the plain English movement. He first published his formula in *Applied Psychology* in 1948. This test has become the standard for children's books, government publications and statutes that require a readability level, such as insurance contracts.

O. Organize "do's and don'ts" together. This is another Real Estate Forms Committee rule. When you have a long list on covenants, for example a lease where the tenant will and will not do things, put all of the affirmative covenants first, then the negative ones.

P. Use plain English. By that I mean English as used in 2014, not 1950, or 1890, or 1492 when Columbus sailed the ocean blue. According to Wikipedia, plain language means communication that emphasizes clarity, brevity, and avoids technical language. It should be easily understood and appropriate to the reader's reading skills and knowledge.

But why strive to write in plain English? I decided to commit to the style so my clients could read the document and tell me if it really matched their understanding of the deal.

14. Miscellany[6].

A. Growing importance. How important is writing, drafting, and editing as a discipline of study? For years, Bryan Garner and Law Prose had a monopoly on teaching legal writing in Texas. However, the State Bar now offers the "Exceptional Legal Writing" seminar and the UT law school has a seminar on "Legal Writing: Precision and Persuasion." The January "Monthly Practice" e-newsletter from the ABA had as its lead article: "Need help expressing yourself clearly and incisively? The ABA offers a variety of writing resources to help you better serve your client and win the esteem of colleagues and adversaries alike. And many of these books are on sale through February 15."

B. A good writer is a good reader. This point came from several blogs or articles. We believe it was intended to refer to litigation writers, to develop creativity. But if the research is true and we have learned our bad habits from all of the old forms, maybe we need to find examples of good contract editing.

C. Blogs. Blogs are another source of help or support in your journey to improve your writing, drafting, and editing skills. We've listed several blog sites on Exhibit C but there are many more, and growing all the time. A warning, most of the blog posts deal with litigation writing, but several are very helpful in drafting. I've set a recurring Outlook calendar entry to remind me to peruse blogs. I hope that creating the monthly habit will also reinforce my commitment to better editing habits.

D. "All laws." When the Real Estate Forms Committee undertook the task of adding the chapter on leases, Phil Weller and Bob Bliss served as the co-chairs of the project. The sub-committee met for more than a year starting with a traditional 20-page, legal size, 9-point font landlord form. When Bob and Phil presented the pared down lease to the full committee, a member was concerned about the section on compliance with law. He asked to expand it to include a reference to ADA and environmental laws. An argument ensued about the language with the perceived need to specifically list all statutes in the lease. The current clause in the Basic Lease is:

> Obey (a) all applicable laws relating to the use, condition, and occupancy of the Premises and Building and (b) any requirements imposed by utility companies serving or insurance companies covering the Premises.

Bad habits are hard to recognize and then even harder to over-come.

E. Know your audience. What does this mean in the real world? My client uses a modified State Bar Form Tenant Estoppel Certificate. Recently, a lender added a paragraph for several loan issues. Paragraphs 1 – 9 on the attached Exhibit D are the buyer's terms. Look at paragraph 10, the lender's insert.

[6] These are stray thoughts, war stories, and vignettes.

Most tenants that will sign a landlord's form are small businesses and may not use an attorney on a regular basis. Consider the impact paragraph 10 might have on a busy manager/ owner. I revised the insert and removed about half of the words, to make it easier for the tenant to understand.

15. Conclusion. Several years ago, I found myself to be 50 pounds overweight. After deciding to do something, I read articles, talked to my doctor, and settled on three rules to lose weight: eat better, eat less, and exercise more - for the rest of my life. I also asked my wife to be my accountability partner to help me change my bad habits. It worked.

The same advice applies to editing. Develop rules, use fewer words, and edit ruthlessly - for the rest of your life.

But you need an accountability partner. The Real Estate Forms Committee was my accountability partner in changing my editing habits. You can create your own editing committee with like-minded friends that agree to develop rules and apply them to forms. But be careful, once you convert from the Clenched Fist to the Open Palm philosophy, you won't be able to stop.

N:\KMK Data Files\KMK\Legal Office\Client\Bar\MLI 2014\Article\MLI Legal Editing 2014.02.docx

EXHIBIT A

Part 3. Summaries of recently published writing, drafting, and editing articles. We offer these summaries to help you locate articles that will address your needs. These are not intended to be a replacement of the articles.

A. Tarver, Writing for the Times, Advanced Real Estate Drafting Course 2001.

Mr. Tarver graduated from law school in 1952. We point that out to note that at the time of his article, he had almost 50 years of experience under his belt.

He summarizes Prof. Mellinkoff's description of legal writing as wordy, vague, pompous, and dull. To see how much weight this statement carries, Google "Mellinkoff Language of the Law" and you will see Prof. Mellinkoff was an early pioneer in teaching legal writing.

Mr. Tarver makes the case that we stay with the old way of writing because we think if it's another lawyer's form, it must be great. Also, laziness, pride in long documents, and the "daunting task of writing well" discourage concise writing. The article challenges the Bar to climb out of the hole of bad documents by setting simplicity, clarity, precision, economy, accuracy, and style as drafting goals. These remain cornerstones of editing principles today.

Mr. Tarver covers many practical issues in drafting and offers clear suggestions and examples. He includes six pages of lists to help you recognize superfluous words and offers the shorter replacement. There is an outstanding summary of punctuation rules for commas, semicolons, colons, dashes, apostrophes, and quotations.

Mr. Tarver attaches a letter of credit example from a prior Advanced Real Estate Drafting Course as an example of really good drafting. But in the spirit of emphasizing the need to be ever vigilant on editing, we would point out that the letter starts off "We *hereby* open our Standby Letter of Credit … ." *Hereby* is on Mr. Tarver's list of words to avoid.

B. Schiess, Legal Writing Is Not What Is Should Be, Southern University Law Review 2009.[7]

Mr. Schiess is the senior lecturer at the University of Texas Law School and the director of the David J. Beck Center for Legal Research, Writing, and Appellate Advocacy. We selected this piece because it is a recent publication, although there are several similar variations of this article available on the internet.

Because of the author's academic position, the article focuses on many societal issues that affect legal writing rather than offering drafting situations and solutions.

After opening with four damning quotations from published authorities on the abysmal state of legal writing, Mr. Schiess opines that "significant improvement in legal writing will be difficult if not impossible to achieve." We would also point out that Mr. Schiess's article focuses more on the legal writing issues than legal drafting/ editing.

[7] Available at http:/ssrn.com/abstract=1661130. Many other articles by Mr. Schiess are available on line and in CLE materials.

The problems inherent in the educational system are:

1. High school and college writing courses focus on self-expression writing. Good legal writing requires a writing style that is knowledge transforming. College students in technical degree programs (such as engineering and accounting) never write any papers.

2. Law school legal writing courses focus on research and legal analysis. There is very little time for grammar or style training. Mr. Schiess also laments that most law schools do not consider legal writing as a real law course so the faculty is not tenured or supported.

3. Law schools do not teach legal drafting. Bryan Garner says in his book, "*Legal Writing in Plain English*" that almost 80% of respondents to a survey said they received training in writing an appellate brief, but no training in drafting a contract.

4. Poor writing skills come from reading bad writing. While Mr. Schiess's paper focuses on opinions and judicial writing, the principles apply to using the tried and true, time-tested forms.

5. Attorneys rely on poorly written forms. Forms are a necessary evil. Forms save time. Forms provide a sense of protection because they are inclusive of everything and every possibility. But the universal piling on, and adding to, creates Frankenstein's monster. A Mellinkoff quotation is included in this section: "[forms] are a quick, cheap substitute for knowledge and independent thinking." One particularly important suggestion is that lawyers should have a database of forms, with a goal to focus on the language in the forms and keep them up to date.

6. A superficial understanding of the transaction in drafting documents leads to sloppy drafting. The section focuses primarily on argumentative writing. Garner's advice to a novice attorney is to make sure you fully understand a provision, and then find out what it means and why it's there.

7. Time constraints do not allow time for revising and editing. Essentially there are numerous quotes to support the principle that editing has been edited out of the drafting process in today's legal environment.

8. Our sense of professional style causes us to ignore the audience. This section covers the pervasive legalese in our documents; the use of Latin and archaic words, big words rather than small ones, passive voice, and wordy sentences. The advice of the experts here is: do not write like a lawyer, write to communicate. This section alone makes this a must read article for document drafting.

9. My writing is great; your writing is the problem. We are complacent in our drafting regimen. Old hands teach new ones, so nothing really changes.

Mr. Schiess makes several recommendations: (a) add drafting requirements to upper-division law classes, (b) add drafting and editing training for new hires, and (c) add State Bar level continuing education requirements in writing, drafting, and editing. He also recommends that lawyers open themselves up to continuing training.

C. Reuler, Sharon, Drafting Documents to Create Planned Communities with Owner's Associations, Advanced Real Estate Drafting Course 2006. Ms. Reuler is a leader in Texas property owner

association laws and a frequent speaker for many years. In this article, she shares her insight into the art of drafting for her audience, rather than documenting the legal issues. While the topic is dated because of legal changes, it is worth reading for the drafting concepts that transcend planned communities and permeate every document we write.

First, she cites Wayne Schiess's 2004 article in the Advanced Real Estate Drafting Course. Make sure you understand everything in the form; have a "starting place form," don't just snag the last deal you did; and take time to thoroughly edit any form you use.

Ms. Reuler then addresses the need to know your writing style. Pay attention to it, get to know and, and develop it. This relates back to the comments above about the two types of legal editors. You need to know who you are. She is particularly sensitive to write in a style that homeowners reading the Declaration 15 years later will be able to understand.

Without copying her entire list, Ms. Reuler offers these drafting style comparisons:

Old Style	New Style
one-sided, protect your client on all points	consider a balanced approach, workable for all parties
serious tone	some humor
shall	will or must
serif font	san serif [8]
no graphics	add graphics[9]

D. Dahm, Lisa L., Drafting Contracts: Practical Tips for Writing Them and for Avoiding Ethical Issues, 28th Annual Real Estate Law Conference, South Texas College of Law 2013. Lisa Dahm is an adjunct professor at the South Texas College of Law. She teaches the intermediate level contract drafting courses, "Contract Building Blocks" and "Contract Negotiation and Drafting." She is also the Director of Continuing Legal Education at South Texas College of Law.

The article focuses on the drafting issues of contracts, as opposed to the editing side. It is an excellent reminder of the process of drafting legal contracts. Prof. Dahm points out that it is not the purpose of contract drafting to persuade or entertain. Contracts document the agreement of the parties.

[8] There is a whole world out there on the topic of readability (fonts, font sizes, margins, bullets, spacing, kerning, even a debate about one or two spaces after a period). One guy wrote what appears to be a doctoral dissertation on the subject of font styles, sizes, and spacing. There isn't a clear choice about whether one font is better than another. But one thing is clear, bad writing is not readable and no font, margin, or kerning will help. Graphics and the written word is a specialty unto itself. One of the best known writers on the subject is Edward Tufte. Someone interested in learning more might start with his work.

[9] I read a linen supply contract that used a simple graphics like topic headers (a cash register by the payment section). Another was a lease that inset a magnifying glass beside the indemnity waivers for emphasis.

Of the three forms of writing: creative (stories, plays, poems), expository (letters, briefs, memos), and legal drafting, law students have little instruction in school to prepare them for drafting. Most drafting skills are learned on the job, rather than in a formal training program. She notes legal writing (petitions and briefs) deals with events that have occurred and you can't go back and change them. But legal drafting must anticipate future events in an evolving situation.

Contract drafting requires an extensive collaborative process. An attorney typically consults many sources and examples to create a starting point form, such as a shopping center lease. The form is often reviewed by attorneys in the firm over many years. Then the client is involved to modify the form to the client's requirements. Finally, another attorney will review the lease to add the attorney's client's changes.

Prof. Dahm also covers ethical rules in drafting. While the rules were written with zealous advocacy in mind, transactional attorneys must work in an environment that requires cooperation in order to complete the deal. She underscores the ethical requirements of competency, following client objectives, and avoiding fraud and dishonesty.

The article discusses several practical drafting tip scenarios. For our purposes, Practical Tip #3 is very important. Prof. Dahm explores the need to be "clear and precise" in contract drafting. Citing several academic publications, she notes this requires shorter rather than longer sentences. One footnoted source says twenty-five is the magic number for words in a sentence. The advice is: (1) short sentences; (2) arranged logically or progressively; (3) with subjects and active verbs (no passive verbs) in the beginning; and finally (4) eliminating the unnecessary words.

This is the most important point in Prof. Dahm's paper. These points are not about law, or deadlines, or meeting with clients. This is the heart and soul of the editing process. As noted above, there isn't really anything new in the field of editing. The problem is understanding the need to commit to some basic rules and follow through.

E. Weller, Phil, Drafting 1.01, Advanced Real Estate Drafting Course 2002. Mr. Weller has presented several papers on drafting and many more papers on real estate subjects.

This paper starts with a unique perspective, why is drafting important? He discusses three reasons based on self-interest: (1) clear drafting will avoid misunderstandings and reduce professional liability; (2) clients can read and understand your work; and (3) the quality of your drafting is your signature to others.

While the article focuses on drafting, there are editing points also. Mr. Weller notes the need to retain internal consistencies in phrases throughout the document to avoid a later claim of interpretation against your client. Also, be careful to maintain the internal consistencies between documents in the same transaction.

Mr. Weller has several exhibits with illustrations of editing, including his somewhat famous (or infamous) example of passive versus active voice [*You shall be _____ed! or _____ you!*].

Finally, for those who learn better from sarcasm, Mr. Weller includes the Blackwell and Weatherbie rules on "how to draft like a lawyer[10]."

[10] Based on my experience in seeing legal drafting, too many attorneys have Dr. Sheldon Cooper's trouble grasping the concept of sarcasm. For the record, these are joke lists and are not intended to serve as guidelines in your practice.

F. Baruch, Chad, Hey! You Can't Write That in Plain English! It's a Real Estate Document!, Advanced Real Estate Drafting Course 2008. Despite the limitation in the title for real estate documents, this is a very comprehensive article on legal writing and drafting. Mr. Baruch has a very strong background in education and has published many articles and books on writing.

We will skip the detailed summary we provided in the prior articles, but want to comment on Mr. Baruch's conclusion. His final section is called "Ruthless Editing." Mr. Baruch writes "[t]o call someone a great legal writer really is to say that person is a great legal editor. Great writing results from sustained and thorough editing."

G. Haggard and Kuney, Legal Drafting (In a Nutshell), Thomson West Publishing 2007. We recommend this book because it focuses on drafting and editing. Other books with "writing" in the title tend to focus more on litigation documents. The authors have more than 60 years of collective experience in teaching legal drafting. This book covers the entire process of drafting.

Chapter 4 covers 20 rules of contract construction. In our research, this topic was not addressed in this detail and provides a good refresher of the old law school subject.

Chapter 12 examines words and specific examples of syntax that can create ambiguity. For example, if a contract directs a trustee to distribute $1,000 to Mary and Tom, does it mean $500 or $1,000 to each party?

The second half of the book covers all of the drafting and editing rules that the previous authors touch on. It is an excellent source of rules with illustrations in a convenient package.

EXHIBIT B

Kevin circulated a Legal Writing Survey to several groups of real estate attorneys. The most significant result is that most lawyers don't respond to surveys. But the non-scientific results validate the conclusions of the experts on writing. Here are some of the questions and a summary of the responses:

A. Describe your writing style. Responses: Plain English, to the point. Less is more – winnow down the verbiage to say it clearly and succinctly. Succinct. Tight; attention to detail. Readily understandable to non-lawyers. Clear and concise sentences.

Point 1: Another speaker in this program (after hearing the overwhelming responses above) told me an old axiom: 90% of all drivers consider their driving skills to be above average.

Point 2: If the foregoing is true, I did not have a proper sampling pool or on a day-to-day basis I never see these lawyers' work product.

B. Can you recommend a book or article? Responses: State bar seminars. Bryan Garner's articles. Hemmingway. Bryan Garner. Bryan Garner's book with Scalia. No response. Bryan Garner and Prof Bromberg at SMU. No. Eats, Shoots, and Leaves, by Lynne Truss.

Point 1: If we use words for a living, why don't we have more resources to improve our writing, drafting, and editing skills?

Point 2: A writing coach noted that when he coaches lawyers and asks this question, there is a minimal response. But when he coaches a journalism group, the response and variety is over-whelming. Since both groups make their living with words, why don't lawyers have more resources for writing?

Point 3: We wonder how Bryan Garner feels seeing how many people are such dedicated followers, but "shall" is so pervasive?

C. Do you have a set of rules for your documents? Responses: Don't have written rules. Not really. KISS –keep it simple stupid/ this takes a lot of work. Chicago Manual of Style. Write to the audience (judge, attorney, or client). No response. Draft so it is readily understandable. Plain English and avoid long sentences.

Point 1: This one was a shocker. For the most part, the respondents can't really say, "this is how I edit/draft."

Point 2: Hopefully with this paper, you will now be able to answer this with very specific rules to edit a document.

EXHIBIT C
BLOGS AND ONLINE SOURCES

Google Search	Blog Site Comments
Legal Writing Prof Blog	This is a collection of cites to other postings, but the third one the day I looked was Bryan Garner. It has a lot of university news also.
Top Ten Legal Writing Blogs	This is an interesting collection of writing sites with reviews. Good source to quickly jump around sites.
Law Prose	This is Garner's site. A lot of his attention is directed to the litigation side but he has some grammar/ word articles.
Write to the Point	This is the Word Rake site, written by Gary Kinder. You can sign up for a weekly e-newsletter for tips/ anecdotes.
The (new) legal writer	Mostly a source of book reviews/ recommendations.
Legalwriting.net Wayne Schiess	Wayne Schiess is the senior writing lecturer at UT Law School. Some helpful points, a lot of updates on his seminars and activities. Good book reviews.
Adams on Contract Drafting	This is an interesting site that focuses more on drafting issues, less on litigation.
A Brief Grammar for Lawyers	Not a true blog, but good material on grammar rules.
Lady (Legal) Writer	Highly rated by ABA, but mostly litigation oriented.

EXHIBIT D
TENNANT ESTOPPEL EXAMPLE

Tenant Estoppel Certificate

Tenant: * (current tenant)

Landlord: *

Lease: *___, between _____ (original landlord) and _____ (original tenant) for the Premises

Center: *

Premises: Suite/Unit _____ in the Center, containing approximately _____ square feet

Buyer: * _____

Buyer has a contract to purchase the Center. As a condition of the closing, Buyer request2 this Tenant Estoppel Certificate from Tenant. Tenant affirms to Buyer and Landlord the following in connection with the Lease:

1. To the best of Tenant's knowledge, Landlord and Tenant are not in default under the Lease. No event has occurred which, with the passage of time or giving of notice, would constitute a default by Tenant or Landlord under the Lease.

2. The current monthly base rental is $_____. Landlord is holding a security deposit in the amount of $_____.

3. Tenant has not transferred or sublet any interest in the Lease.

4. A complete copy of the Lease is attached as Exhibit "A".

5. The Lease is in full force and effect.

6. There are no offsets against the rentals payable under the Lease. Tenant is not aware of any discrepancies in connection with any prior year's reconciliation charges.

7. Tenant does not have any right to renew the term of the Lease or any option to purchase all or any part of the Premises or the Center.

8. Tenant currently occupies the Premises and operates its business on the Premises.

9. Tenant has received all tenant improvement money under the Lease.

10. Tenant hereby agrees:

(1) To send a copy of any notice or demand given or made to Buyer, as successor Landlord, pursuant to the provisions of the Lease, by certified mail, to Goldman Sachs Bank USA ("Lender"), 100 Crescent

Court, Suite 1000, Dallas, TX 75201 Attn: Greg Furness, who is or will be the owner and holder of a mortgage on the Premises, or its assignee upon being notified in writing of such assignee's name and address;

(2) To give to a reasonable period of time, but in no event less than thirty (30) days, to cure any default complained of in said notice or demand;

(3) No rent (other than monthly common area expense reimbursements) shall be prepaid under the Lease for more than one (1) month in advance during the term thereof without Lender's prior written consent;

(4) the Lease shall not be modified in any manner (except for "administrative amendments") or surrendered, cancelled, or terminated (except for a breach by Buyer, as successor Landlord,) without Lender's prior written consent (for purposes of this estoppel certificate, an "administrative amendment" to the Lease shall mean any amendment or modification which is executed by Tenant and Buyer, as successor Landlord, for the purpose of clarifying the terms of the Lease without material modification to the economic terms or obligations of Buyer, as successor Landlord, thereunder);

(5) If Lender shall notify Tenant that a default has occurred under the mortgage encumbering the Premises and shall demand that Tenant pay rentals and other amounts due under the Lease to Lender, Tenant will honor such demand notwithstanding any contrary instructions from Buyer, as successor Landlord, provided that any such payments made to Tenant to Lender will be applied against any payments owed by Tenant under the Lease;

(6) That in the event that Lender acquires title to the property encumbered by the mortgage, Lender will not be liable for any security deposit that Tenant may have given to any previous landlord (including Buyer and Landlord) which has not, as such, been transferred to Lender;

(7) The Lease does not contain any options to purchase and/or rights of first refusal to purchase the Premises or any portion of the project of which the Premises is a part; and

(8) Tenant understands that Lender will rely upon the certifications and agreements in this Tenant Estoppel Certificate in making a loan to Buyer.